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# Supreme Court of the United States

NO. ~~1157~~ 257

JOE R. STEELE
*Petitioner*

versus

UNITED STATES OF AMERICA
*Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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To The Honorable Supreme Court of The United States:

The Petitioner respectfully asks for a Writ of Certiorari to the Court of Appeals for the Fifth Circuit to review a judgment of that Court affirming a conviction for income tax evasion in the District Court for the Western District of Texas, Austin Division.

### Opinion

The opinion of the Court of Appeals was filed on April 26, 1957 and is not yet officially reported, but appears in Appendix A.

## Jurisdiction

The judgment of affirmance was dated and entered April 26, 1957 (Appendix B). Petition for Rehearing was duly filed on May 14, 1957, within the 21-day period allowed therefor by Rule 29 of the Rules of the Court of Appeals for the Fifth Circuit. Such Petition for Rehearing was denied by order dated and entered June 11, 1957 (Appendix C).

Jurisdiction of this Court to review is granted by Section 1254(1) of Title 28, U.S.C.A., and Rule 37(c) of the Federal Rules of Criminal Procedure.

## Questions Presented

1. Has not the rule announced in *Raffel vs. United States*, 271 U.S. 494, been stripped of vitality by *Johnson vs. United States*, 318 U.S. 189, making it a violation of the privilege against self-incrimination to require a defendant, offering himself as a witness upon the second trial of a criminal case, to disclose to the jury that he had not testified as a witness in his own behalf upon the first trial?

2. Even if *Raffel vs. United States*, 271 U.S. 494, still has vitality after *Johnson vs. United States*, 318 U.S. 189, is it not necessary under the doctrine of *Grunewald vs. United States* (decided May 27, 1957 and not yet officially reported) for the Government to make some showing in the record, and for the trial court to find, inconsistency as a predicate to interrogation of the defendant on the second trial of a criminal case regarding his failure to testify as a witness in his own behalf at the first trial?

3. If it is error to require the defendant, offering himself as a witness upon the second trial of a criminal case, to disclose that he had not testified as a witness in his own behalf upon the first trial, can such violation of the privilege against self-incrimination be said to be "harmless error?"

4. Where a defendant, offering himself as a witness upon the second trial of a criminal case, is required to disclose to the jury that he had not testified as a witness in his own behalf upon the first trial, did it not serve to underscore, rather than cure, the error, for the trial judge to instruct the jury:

> "The evidence in this case has developed the fact that the case has been tried before. In that connection you are instructed that you will not consider for any purpose, nor discuss that fact in determining the guilt or innocence of the defendant. You will consider only the evidence adduced at this trial in determining the guilt or innocence of the defendant and not speculate as to the evidence introduced in the former trial." (R. 14-15)

5. Does not the doctrine and rationale of *Slochower v. Board of Education*, 350 U. S. 551, compel the conclusion that a defendant, under the circumstances aforesaid, is denied due process of law when his failure to testify in his own behalf at a former trial of the case is brought out by Government counsel, and the trial court advises the jury that evidence adduced at this trial may be considered in passing upon the guilt or innocence of the defendant?

6. Where at the outset of the second trial of a criminal case the trial judge issues instructions to all counsel that every effort is to be made to avoid any reference to the prior trial and no inquiry is made at the time of the issuance of such instruction as to whether defendant plans to take the stand in his own defense and such instruction is permitted to remain in force throughout the trial, is it not a denial of a fair trial under the Sixth Amendment as well as a denial of due process and a violation of the privilege against self-incrimination under the Fifth Amendment for the trial court to require the defendant, offering himself as a witness in his own behalf, to disclose that he had not testified as a witness in his own behalf at the first trial, particularly where the trial judge is notified of the defendant's intention to take the stand before he offers himself as a witness and the trial judge gives no notification of any change in the existing instruction?

7. Is it not a violation of the constitutional guarantee of a fair trial to require the defendant in a criminal case to testify in the presence of the jury that he was convicted more than ten years before the trial of a non-related felony offense, particularly where the defendant has not offered evidence as to his credibility and reputation for truth and veracity.

8. In a criminal income tax evasion case where gambling income is involved and evidence has been admitted (over objection) of a conviction for "gaming," a non-related felony offense more than ten years before the trial, is it not asking of the jury

an impossible mental gymnastic to instruct them to consider such evidence only in passing upon the credibility of the defendant and not in determining his guilt or innocence?

## Constitutional Provisions and Statutes

### Fifth Amendment

"No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law * * * * * ."

### Sixth Amendment

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ."

## Statement of the Case

This appeal results from the second trial of this case. In the original trial Steele was convicted on all three counts of a three-count indictment for income tax evasion under Section 145 (b), Article 26, U.S. C. That conviction was reversed by the Court of Appeals for the Fifth Circuit in *Steele vs. United States*, 222 F (2) 28. At the second trial, count two of the indictment was dismissed and the jury found Steele guilty on count one and not guilty on count three. The sentence is for two years and $7500 fine (R. 1424; 1456). Bail pending appeal was granted by the trial judge (R. 1424; 1460). Bail was con-

tinued by the Court of Appeals, Fifth Circuit, pending this application (R. 1522).

The conviction was affirmed by the Court of Appeals for the Fifth Circuit (Appendix A), and rehearing was denied by order of that Court (Appendix C).

On the second trial of the case the defendant took the stand in his own behalf, and at the close of cross examination was required over defendant's objection, to answer the following question "Yes" or "No":

> "Mr. Steele, will you just give me a yes or no answer, The question will be asked in such a manner that it can be answered yes or no. Isn't it a fact that you did not take the stand in your behalf at a previous trial of this case." (R. 1074-6 & R. 1486).

At the request of defendant's counsel and before any proceedings were had in the second trial the trial judge instructed all counsel involved in the case that every effort was to be made to make no reference to the former trial (*R 1483*). This rule was adhered to throughout the course of the trial, and before the defendant was called as a witness the trial judge was notified of his intention to take the stand in his own behalf (R. 912-912A) and a ruling obtained on other matters. No mention was made by the trial judge during this colloquy (had out of the hearing of the jury) or Government counsel changing or amending the ruling then in existence.

Likewise before the defendant took the stand (R. 912 - 913A) defendant's counsel asked the Court to

instruct the prosecution not to interrogate defendant with reference to whether or not he had been convicted of a felony and the court refused such request, it being understood that the objection would go to all such testimony. Briefly summarized, the objection to admission of such evidence was on the grounds of remoteness (conviction in 1943 and trial in 1956); no connection between the former offense and the offense alleged in the indictment; the prior conviction having been for an offense not similar to those alleged in the indictment; the prejudice which would arise in the minds of the jurors against defendant; and the prior conviction being one for "gaming" under state law, it was not a crime involving moral turpitude. (R. 1487-89)

Thereafter during cross examination of the defendant the Government adduced evidence of the defendant's conviction in 1943 for "gaming, a policy game, a felony." (R. 1074)

## Argument

### I.

### Cross Examination As To Claim of Privilege Against Self Incrimination
(Germane to Questions 1, 3, 4 & 5)

A major constitutional question is presented for the consideration of the Court by the cross examination of the defendant Steele with respect to his claim of privilege on the former trial. Omitting for the moment questions regarding the lack of proper predicate and the violation without warning of the

instruction of the court that the former trial would not be mentioned, the question presented here is identical with the question in *Raffel vs. United States*, 271 U.S. 494. At the first trial of the case Steel had claimed his privilege against self-incrimination by refraining from taking the witness stand. At the second trial he took the stand and at the close of cross examination he was compelled to answer, over objection, that he had failed to testify in his own behalf at the first trial. Thus his claim of privilege was used to his great detriment and for no other conceivable purpose than to inflame and prejudice the minds of the jurors against him. Consequently, this Court is faced with the decision as to whether *Raffel* can be permitted to endure and whether a defendant who claims a privilege guaranteed to him in the Constitution can, at some later date, not only be haunted by its exercise but also have such fact used in evidence against him.

> "In our civilization, our Constitution has rejected the idea of compelling a witness to give evidence against himself. Surely it is better so. Let us not condemn any man for merely asserting a right believed to be so fundamental that it is embodied in our Constitution itself." Joseph N. Welch, "The Challenge of the Learned Professions—The Law" - Journal of the American Judicature Society, Vol. 40, Nos. 5 & 6 (February - April 1957).

From the concurring opinion in *Grunewald vs. United States* (not yet officially reported) it seems clear that at least four members of this Court feel that the rule in *Raffel* has been strip-

ped of vitality by *Johnson vs. United States*, 318 U.S. 189, and that the same should be explicitly overruled. The majority of the Court did not feel that *Raffel* was directly involved in the *Grunewald* case and therefore expressly refrained from passing on the curent status of the *Raffel* rule.

The vice in *Raffel* and *Grunewald*, however, did not assume the far reaching proportions that it did against Steele. In both *Raffel* and *Grunewald* the jury was specifically instructed to confine the use of the evidence regarding the exercise of the privilege against self-incrimination to its consideration in passing upon the credibility of the defendant. Here the trial judge called attention to evidence that the case had been tried before and, while instructing the jury not to speculate as to what happened in the former trial, he nevertheless told them that they were to consider only the evidence adduced at this trial "in determining the guilt or innocence of the defendant." Thus, the best that can be said for the charge is that it says nothing as to what the jury was to do with the evidence about the claim of the privilege, and the worst that can be said of it is that the jurors were specifically advised to consider the claim of the privilege in passing upon the guilt or innocence of Steele.

Interestingly enough, the opinion of the Court of Appeals (Appendix A) attempts to use this portion of the charge to gloss over the error which was committed by saying:

> " . . . the error was the technical one of asking a question, the answer to which was immaterial and irrelevant."

The Court of Appeals uses such portion of the charge, together with evidence adduced on redirect to the effect that the defendant did not take the stand at the first trial on advice of counsel, and on surrebuttal, to the effect that at the former trial the defendant was convicted, sentenced and that the conviction was reversed on appeal — all to make the error "harmless error" under Rule 52A.

The Federal Appellate Courts have consistently held that an exception to the admission of incompetent evidence is not waived or withdrawn by having the explanation of the witness go to the jury. *Walker Grain Co. vs. Blair Elevator Co.* (5th Cir.) 254 F. 422; *Fuechtwanger vs. Manitowac Co.*, (7th Cir.) 187 F. 713.

And this Court in *Emspak v. United States*, 349 U. S. 190, 198, has held that constitutional rights may not be waived upon "vague and uncertain evidence," for:

> "To conclude otherwise would be to violate this Court's own oft-repeated admonition that the courts must indulge every reasonable presumption against waiver of fundamental constitutional rights." (Citing cases in footnote)

What the Court of Appeals has done here is to combine an improper and erroneous charge with evidence properly used to attempt to combat the gross error committed and to conclude that such combination renders the result "harmless error."

This is a novel and, petitioner says, fallacious concept.

Not only does the harmless error rule itself confine "harmless error" to those items which do "not affect substantial rights," but this Court, in *Kotteakos vs. United States*, 328 U.S. 750, in circumscribing the limits of the harmless error rule, strongly indicated (at Page 773 of the opinion) that violation of a constitutional right can never be "harmless error," saying:

> "But our Government is not one of mere convenience or efficiency. It too has a stake, with every citizen, in his being afforded our historic individual protections, including those surrounding criminal trials. About them we dare not become careless or complacent when that fashion has become rampant over the earth."

Finally, this Court in *Slochower vs. Board of Education*, 350 U.S. 551, asserted:

> "At the outset we must condemn the practice of imputing a sinister meaning to the exercise of a person's constitutional right under the Fifth Amendment. . . . In *Ullman vs. United States*, 350 U.S. 422, 100 L. Ed. 511, 76 S Ct. 497, decided last month, we scored the assumption that those who claim this privilege are either criminals or perjurers. The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury."

## II.

### Necessity for Predicate to Attack Credibility of a Witness
(Germane to Question 2)

Evidence of the claim of privilege on the first trial in *Raffel vs. United States* was admitted not on the theory that it had any relevance or materiality in determining the guilt or innocence of the accused but only in passing upon his credibility. No authority has been found wherein such evidence has been held proper as bearing upon the merits of the case and it is believed none exists. Consequently, if the Government seeks to justify the admission of this evidence as bearing upon the guilt of the defendant, then it is respectfully submitted that it was clearly and patently erroneous to admit it; that the objection as to its relevance and materiality should have been sustained and that a reversal of the case is in order.

On the other hand, if the admission of the evidence is sought to be justified on the theory that its use was to be confined to testing the credibility of the defendant, then, there being no conflict here, the case should likewise be reversed. Turning aside from our fundamental contention that a claim of a constitutional privilege should never be permitted to be used as a basis for attacking the credibility of a defendant and that in consequence *Raffel* should be explicitly overruled, there was no basis for the asking of the question of the defendant Steele. The majority opinion in *Grune-*

*wald vs. United States* holds that there must be a preliminary finding by the trial judge, with a basis in fact, that some inconsistency exists between the prior silence and the testimony given at the trial; otherwise the silence at the former trial may not be used for impeachment purposes. The majority of this Court in its opinion in the *Grunewald* case found in Footnote 30 that ". . . there was no inquiry by the judge at the time of the initial admission of this evidence as to whether a sufficient showing of inconsistency had been made."

This same statement is equally applicable to the occurrence in the Steele trial.

The majority opinion in *Grunewald* designated as "the threshold question" whether the trial court erred in holding

> ". . . that Halperin's plea of the Fifth Amendment privilege before the grand jury *involved such inconsistency with any of his trial testimony as to permit its use against him for* impeachment purposes." (emphasis added)

The record in the case at bar is completely devoid of any showing whatsoever of inconsistency. Neither is there any inquiry shown on the part of the trial judge. All we have here is a bare question and a bare answer, both calculated to inflame and prejudice the minds of the jurors against the defendant.

Thus the rule in *Raffel*, if it is to stand at all, has been confined within very narrow limits by the *Grunewald* opinion:

> "We do not think that *Raffel* is properly to be read either as dispensing with the need for such

> preliminary scrutiny by the judge, or as establishing as a matter of law that such prior claim of privilege with reference to a question later answered at the trial is always to be deemed to be a prior inconsistent statement irrespective of the circumstances under which the claim of privilege was made."

There is no showing here, as there was in *Raffel*, that any statement of the defendant as a witness conflicts with any Government evidence adduced *at the former trial*. The record here simply does not show the slightest basis for the asking of the question. The majority opinion issued by this Court in *Grunewald vs. United States*, furthermore, makes it clear that this Court will closely scrutinize the findings of the trial judge as to the existence of inconsistency and, finding none, will reverse the case because of prejudicial error of the trial court in permitting cross examination of the defendant on the use of his privilege against self-incrimination. The Court summarized the matter thusly:

> "But where such evidentiary matter has grave constitutional overtones as it does here, we feel justified in exercising this Court's supervisory control to pass on such a question. This is particularly so because in this case the dangers of impermissible use of this evidence far outweigh whatever advantage the Government might have derived from it if properly used."

Petitioner submits that the ruling of the trial judge as affirmed by the Court of Appeals is in

direct conflict with the decision of this Court in *Grunewald (Halpérin) vs. United States.*

## III.

### Violation of the Court's Existing Instruction as Violation of Fifth and Sixth Amendments

(Germane to Question 6)

Upon requst of defendant's counsel, made before the presentation of any evidence, the court instructed all attorneys in the case that every effort would be made to avoid any reference of any kind or character to the fact that the case had been tried before (R. 1483). Before the defendant took the stand the court was notified of the fact that he was going to be a witness in his own behalf, and, while other matters were discussed out of the hearing of the jury at length, the court made no mention of any contemplated change in this "ground rule" instruction (R. 912 - 912A). Following this discussion the defendant took the stand and at the close of cross examination of the defendant the Government was permitted over objection to elicit a "Yes" answer to the question, ". . . Isn't it a fact that you did not take the stand in your behalf at a previous trial of this case?" (R. 1076 and R. 1486). During the colloquy which occurred at the bench out of the hearing of the jury while objection was being made to the question, the existing "ground rule" was called to the attention of the trial judge and he stated that such rule had been adopted ". . . before I knew the defendant was going to take the stand" and that his changed ruling was "based on a Supreme Court de-

cision" (R. 1075 - 1076). No limitation was placed at the time of its adoption on the existing "ground rule" by the trial judge based upon whether or not the defendant was to testify and no notice was given as to any contemplated change until the Government at the very end of its cross examination asked the question involved.

It is the contention of this defendant that what happened here was far more aggravated than *Raffel* and *Grunewald* combined. Of course, had any witness who had testified at the previous trial given conflicting testimony with his evidence at the former trial, then undoubtedly his evidence at the former trial could have been used for impeachment purposes notwithstanding the existing "ground rule," but no such eventuality developed. The rule adopted by the court was strictly adhered to throughout the trial and the defendant, who had not testified at the previous trial, had every reason to believe that the rule would be enforced as adopted, particularly as to him, because there was nothing about his silence which could be properly used for impeachment purposes. It is, therefore, respectfully submitted that Steele took the witness stand in reliance upon the "ground rule" instruction and that the same was an inducement to him to testify.

> "The problem here is a different one. It is whether a procedure will be approved which deprives an accused on facts such as these of an intelligent choice between claiming or waiving his privilege. Knowledge that a failure to testify, though permitted by the Court, would be submitted to the jury might seriously affect

> that choice. If the accused makes the choice without that knowledge, he may well be misled on one of the most important decisions in his defense. We would of course not be concerned with the matter if it turned only on the quality of legal advice which he received. But the responsibility for the misuse of the grant of claim of privilege is the court's. It is the court to whom an accused properly and necessarily looks for protection in such a matter." *Johnson vs. United States*, 318 U.S. 189, 198, 199.

The denial of a fair trial under the peculiar facts and circumstances of this case is predicated upon the concept that when a "ground rule" is adopted by the trial judge and passed on to all counsel in the form of a specific instruction, then the defendant and his counsel are entitled to timely, fair and full notice when that ground rule is changed during the course of the trial. It is patent from the record that no such notice was given to defendant or his counsel of any change in the existing rules which were to pertain to the trial of the case. No mention was to be made of the former trial, and yet at the very end of the cross examination of the defendant a direct question was asked of the defendant relating to his conduct at the former trial. This was a violation not only of the fair trial guaranty made by the Sixth Amendment but also of due process under the Fifth Amendment.

The Court of Appeals for the Fifth Circuit in *Gomila vs. United States*, 146 F. 2d 372, stated that a

> "fair and impartial trial is guaranteed to every defendant, and [this] fundamentally

means a trial before an impartial judge and by an impartial jury."

The Court of Appeals for the Tenth Circuit has aptly said:

> "The bars which guard the right to a fair trial, such as is guaranteed by our Constitution, include court procedure, rules of evidence and proper instructions to the jury. These bars must not be lowered. To do so is to strike at the very foundation of our system of jurisprudence which has for its ultimate goal the preservation and protection of the liberty and freedom of the individual citizen." *Miller vs. United States*, (10th Cir.) 120 F. 2d 968.

The effect of occurrences of this kind has been described as follows:

> "The denial of a fair and impartial trial as guaranteed by the 6th Amendment to the Constitution, is also a denial of due process, demanded by the 5th and 14th Amendments, and the failure to strictly observe these constitutional safeguards renders a trial and conviction for a criminal offense illegal and void . . ." *Baker vs. Hudspeth*, (10th Cir.) 129 F. 2d 779 (Certiorari denied 63 S. Ct. 291, 317 U.S. 681, 87 L. Ed. 546).

The Courts have never laid down any hard and fast rule or test by which the concept of a fair trial can be accurately measured in every instance. However, this Court has adopted a test which would

seem peculiarly applicable under the facts and circumstances here presented:

> "Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular test and procedure is not chained to any ancient and artificial formula." *United States vs. Wood*, 299 U.S. 123, 57 S. Ct. 177, 81 L. Ed. 78.

To say that the trial judge did not know when the "ground rule" was adopted that defendant was to take the stand is to beg the question. Certainly defendants in making important decisions during the course of trial should not be charged with knowledge of the undisclosed mental processes of the trial courts.

Petitioner does not allege a calculated effort on the part of the learned trial judge to militate against his interest. But the cases require no such motive or intent. They do require a fair trial. The asking of the question in the presence of the jury and the sanction thereof by the court in the light of the unchanged, existing instruction which had induced defendant to become a witness in his own behalf was a denial of a fair trial. It was a denial of due process. To use a rough metaphor, it changed the rules in the middle of the game without an iota of warning.

It is respectfully submitted that the approval by the Court of Appeals of this occurrence has so far sanctioned a departure from the accepted and usual

course of judicial proceedings as to call for an exercise of this Court's power of supervision. Rule 19 (b), Revised Rules of the Supreme Court of the United States, July 1, 1954.

IV.

**Evidence of Conviction For Non-Related Felony Offense**

(Germane to Questions 7 & 8)

The question here relates to the correctness of the trial court's ruling in admitting evidence, over objection, of a conviction of the petitioner for "gaming" more than thirteen years before this trial.

It is the position of petitioner that because of the remoteness of this offense, because it is completely dissimilar to income tax evasion, and because the only possible effect of the evidence would be to prejudice the minds of the jurors against the defendant, it should not have been admitted by the trial judge.

Petitioner is well aware of the numerous cases that hold that when a defendant takes the witness stand evidence of a conviction of a felony or for a misdemeanor involving moral turpitude may be admitted. This has as its basis the common law which has been followed in view of Rule 26, Federal Rules, Criminal Procedure, providing as follows:

> "In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an act of Congress or by these rules. The admissibility of evidence and the

> competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law *as they may be interpreted by the courts of the United States in the light of reason and experience.*" (emphasis added).

Petitioner asserts that the position heretofore taken should be carefully re-examined. The principles of the common law should be applied, but they should be applied "in the light of reason and experience." In view of this language it has been asserted that the rule heretofore adopted by the courts pertaining to the admissibility of such evidence could be changed without statutory enactment. *United States vs. Grunewald*, (2nd Cir.) 233 F. 2d 556, 578.

It has always been deemed proper, if indeed not mandatory, that when evidence of a former felony conviction is admitted as against a defendant, to include in the charge a cautionary instruction advising the jury not to consider the same in passing upon the guilt or innocence of the defendant but to confine such evidence to the issue of credibility alone. Such a cautionary instruction was given in the trial of this case. (R. 1412).

The difficulty with admitting this type of evidence as against a defendant and the use of the cautionary charge is that it does not achieve the desired result. Juries are unable to engage in the mental gymnastic of segregating and separating this evidence from the issue of innocence or guilt.

Instructions such as this have been severely criticized in *Krulewitch vs. United States*, 336 U.S. 440, 450:

> "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . , all practicing lawyers know to be unmitigated fiction."

Judge Learned Hand has questioned the efficacy of such cautionary instruction on numerous occasions, stating in *Nash vs. United States*, (2nd Cir.), 54 F. 2d 1006, 1007, that it constitutes "The recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody's else," and in *United States vs. Gottfried*, (2nd Cir.), 165 F. 2d 360, 367, "nobody can indeed fail to doubt whether the caution is effective," and finally in a dissenting opinion in *United States vs. Antonelli Fireworks Co.*, (2nd Cir.), 155 F. 2d 631, 656, stating that the cautionary instruction may emphasize the very matter the jury is told to forget, "as in the story, by Mark Twain, of the boy told to stand in a corner and not think of a white elephant." Professor Wigmore (8 Wigmore Page 416) has characterized such instructions as "artificial fictions" and has condemned the process as one which attempts "to enlist the layman in the process of nullifying his own reasoning powers" which, he concludes, is futile and tends toward confusion.

The necessity of giving the cautionary instruction merely serves to underscore the reason for a change in the existing rule. If it is necessary when such evidence is admitted to attempt to rectify the situ-

ation by giving a charge which has been so frequently held to be ineffective, then would it not be more reasonable and logical to exclude the evidence in the first place?

One existing statute and several proposed statutes would limit the use of such evidence to impeaching the credibility of a defendant only if (1) the evidence of the former crime is relevant as tending to prove the commission of the crime for which he is on trial, or (2) he affirmatively introduces evdience for the sole purpose of supporting his own credibility. See Model Code of Evidence, American Law Institute 1942, Rule 106 (3); Uniform Rules of Evidence (1953) Rule 21; Pennsylvania Statutes 1911.

In the foreword to the Model Code of Evidence, American Law Institute, supra, Prof. Edmund Morgan, at page 22, says:

> "Rule 106 (3) is intended to encourage an accused to take the stand by limiting the right to impeach him. If he testifies and introduces no evidence for the sole purpose of supporting his credibility, the prosecution may not, for the sole purpose of impairing his credibility, cross-examine him or introduce extrinsic evidence concerning his commission or conviction of a crime; if he does introduce evidence for the sole purpose of supporting his credibility, then the prosecution may impeach him like any other witness. This rule does not exclude evidence of his commission of any other crime relevant as tending to prove his commission of the crime for the commission of which he is on trial."

The Court of Appeals in its opinion likewise relies upon the harmless error rule with reference to this

evidence. This is so, says the Court, because the record is replete with evidence of gambling income. But petitioner respectfully asserts that direct evidence that he was a convicted felon could easily have been the deciding factor in the minds of laymen who find it difficult to consider this evidence when passing upon the credibility of the defendant and then dismiss it completely from their minds when passing on the issue of guilt or innocence. If it was error to admit the evidence, certainly it is wrong and an erroneous theory to say that it was harmless error.

**Conclusion**

The jury conducted lengthy deliberations in reaching its verdict in this case. It finally acquitted the petitioner on one count of the indictment and found him guilty on the other. In these circumstances who can say that the error which was committed in the improper admission of evidence was "harmless error"? The evidence as to the claim of privilege on the former trial was patently inflammatory and prejudicial. In attempting to show the relevance of the evidence in its brief in the Court of Appeals the Government made it clear that it wanted the jury to infer from such evidence that the defendant had a "made up" defense. Its brief asserts:

> ". . . the defendant had had some two years to review the Government's evidence and to set up a defense."

The culmination of the harm which was intended to be injected into the case by evidence of the silence

of the defendant at the first trial occurred in the closing argument of Government counsel as follows:

> "I've already mentioned about his appearance on the stand here, *the first time he's ever come forward in this case to offer these explanations.*" (R. 1388)

The attitude of this Court with reference to the attempted application of the "harmless error" doctrine to cases such as this is reflected in the following language from *Glasser vs. United States*, 315 U.S. 60, 67:

> "In all cases the constitutional safeguards are to be jealously preserved for the benefit of the accused, but especially is this true where the scales of justice may be delicately poised between guilt and innocence. Then error, which under some circumstances would not be ground for reversal, cannot be brushed aside as immaterial since there is a real chance that it might have provided the slight impetus which swung the scales toward guilt."

WHEREFORE, petitioner respectfully prays that a Writ of Certiorari be granted and that the judgments below be reversed and petitioner be granted a new trial.

JOE R. STEELE, *Petitioner*

BY: BEN F. FOSTER
and
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SOLICITOR GENERAL
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United States Attorney
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I hereby certify that I have delivered a copy of the above Application for Writ of Certiorari to counsel named above by depositing in the United States Mail, with first class postage prepaid, to the Post Office address indicated in each instance.

BEN F. FOSTER

Appendix A

In The

UNITED STATES COURT OF APPEALS

For The Fifth Circuit

No. 16234

JOE R. STEELE,
*Appellant,*
versus
UNITED STATES OF AMERICA,
*Appelle.*

*Appeal from the United States District Court for the Western District of Texas*

(April 26, 1957.)

Before HUTCHESON, Chief Judge, and TUTTLE and JONES, Circuit Judges.

HUTCHESON, Chief Judge: Tried on an indictment charging income tax evasion, in Count One for the year 1947 and in Count Three for the year 1948,

defendant was acquitted on Count Three and convicted and sentenced on Count One to two years imprisonment and a fine of $7500.

As on the previous trial, the conviction in which was reversed, *Steele v. United States*, 222 F(2) 28, while no specific item of unreported income was shown by direct evidence, the government undertook to show understatements of income by the net worth and expenditures method.

Appealing from the verdict and judgment, appellant attacks the trial as unfair and affected with prejudicial error in two respects. One of these is permitting the government, on cross examination of the defendant after he had taken the stand in his own behalf and over defendant's objection, to elicit the answer "Yes" to the question:

> "Mr. Steele, will you just give me a yes or no answer. The question will be asked in such a manner that it can be answered yes or no. Isn't it a fact that you did not take the stand in your behalf at a previous trial of this case?"

The other is permitting the government, over defendant's objection that the offense was too remote in time and that it was unrelated to the offenses for which he was on trial, income tax evasion, to interrogate the defendant on cross examination regarding a prior felony conviction for gaming.

In addition to these attacks upon the trial procedure, appellant makes the fundamental attack

upon the verdict and judgment, that the evidence was insufficient to sustain it and that a verdict of acquittal should have been and should now be directed on his motion for acquittal.

Confidently urging these claims upon us, singly and together, in a well written and argued brief, appellant insists that they are all well taken and should be sustained, while the United States, resisting the claims with equal confidence and vigor, insists that no reversible error attended the trial and that the judgment must be affirmed. For the reasons hereafter stated, we agree that this is so.

Upon its first point, appellant, insisting that on principle the answer sought and elicited was without testimonial relevancy and its admission was error, urges upon us that it was highly prejudicial error both because the very nature and frame of the question cast an aspersion upon him for not having taken the stand, thereby violating his constitutional right to refrain from testifying on the former trial, and because the defendant had taken the stand in reliance upon the prior ruling of the court that the former trial should not be referred to. Arguing that the Supreme Court in the Johnson case, 318 U.S. 189, has foreshadowed its departure from the Raffel case, *Raffel v. United States*, 271 U.S. 494, and that the recent grant of certiorari in the case of *United States v. Grunewald*, 233 F(2) 556 has confirmed this departure, the appellant asks us to hold that there was error in asking the question, or, if we will not do so, to withhold our decision until the Supreme Court has acted in the Grunewald case.

We are of the clear opinion that neither of these requests should be granted. This is so both because it is clear that, under the decisions as they now stand,[1] there was no error in admitting the evidence and because the facts and issues in the Grunewald case are different from those here, and no sufficient showing is made that a reversal of the decision in Grunewald would require a reversal here. Indeed, when the point now under discussion is considered in the light of the whole record, it seems clear that, if it was error to admit the evidence, the error was the technical one of asking a question, the answer to which was immaterial and irrelevant, (Cf. *Raffel v. United States*, 271 U.S. 494, at page 497) which, under Rule 52(a) was "harmless error".[2]

While the government in its brief does argue that the question was relevant because, as stated in the Raffel case, if the cross examination had revealed "the real reason for the defendant's failure to con-

---

[1] Including the testimony of the defendant on redirect, that it was upon the advice of his counsel that he did not take the stand, and his surrebuttal testimony, that he was convicted on the trial and given a sentence, and that his conviction was set aside on appeal, and the instruction of the district judge:

"The evidence in this case has developed the fact that the case has been tried before. In that connection you are instructed that you will not consider for any purpose, nor discuss that fact, in determining the guilt or innocence of the defendant. You will consider only the evidence adduced at this trial in determining the guilt or innocence of the defendant and not speculate as to the evidence introduced in the former trial." (Record pp. 14-15)

[2] "52(a) Harmless Error. Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded." Rules of Criminal Procedure, 18 U.S.C. pp. 570-572, and Ann. Pocket Part p. 236-238 Incl.

tradict the government's testimony on the first trial was a lack of faith in the truth or probability of his own witness, his answer would have a bearing on his credibility and on the truth of his own testimony in chief", here the question was strictly limited to an answer "Yes" or "No". No effort was made to follow the answer up, and the district judge by his instruction excluded the whole matter of the former trial from the jury's consideration.

Appellant's argument that the matter is made more serious by what he calls the ground rule laid down by the judge at the beginning of the trial, that no reference should be made to the former trial, will not, we think, stand up because as the court stated, and it was in effect admitted, at that time it was not supposed that the defendant would take the stand.

Finally, the verdict of the jury, convicting the defendant of the smaller amount of evasion charged in the 1947 tax year and acquitted him of the larger amount in the 1948 tax year, shows plainly that the defendant took no prejudice from the ruling but, on the contrary, obtained a benefit from the defendant's answer, that he was convicted and sentenced to four years, and the judgment was reversed.

On its second point, appellant stands no better. Indeed, not as well. Admitting that it is the general rule that when a defendant takes the witness stand he may be impeached as any other witness, and that there are many cases holding that the admission of evidence of convictions of a felony or of a mis-

demeanor involving moral turpitude is not error, he yet urges upon us that, in admitting this evidence under the facts and circumstances, the district court abused its discretion and the admission was prejudicial error.

We cannot at all agree. We think that but for the matter of remoteness in time there could be no basis for the claim and that, in admitting the evidence under the circumstances of this case, the court was well within its discretion. If, however, we should be mistaken in this, it is quite plain that no prejudicial error occurred. Defendant was allowed to and did show that he received a pardon. Besides, since the major part of the evidence in the case dealt with gambling and the profits derived therefrom, the proof of the conviction for gaming could not be said to have in any way introduced a new element into the case which reflected discreditably upon appellant. If he was prejudiced by the fact of his gaming, the prejudice was established by the necessarily relevant evidence as to the source of his income, and if that did not prejudice him, the mere fact that he had been convicted in connection with his business and received a pardon certainly could not be said to do so. The whole design and purpose of Criminal Rule 52(a) emobdying and carrying forward the long continued provision for harmless error embodied in the statutes, was, while protecting a defendant from substantial and harmful error, to prevent wholesale reversals for immaterial and harmless error.

As the Supreme Court said in the Lutwak case, 344 U.S. at 619: "A defendant in entitled to a fair

trial but not a perfect one.' See also *Elder v. United States*, 213 F(2) 876.

Devoting a large portion of its brief to the presentation of his third and final point, that a verdict of acquittal should have been directed, appellant, by an argument, falling short we think of demonstrating as a matter of law that no case for a jury verdict was made out, so invests with plausibility the claim made to the trier of facts, that on the evidence as a whole he ought not to have been convicted on either count, as to furnish a common sense explanation for the verdict which, convicting him on one count, acquitted him on the other. In short, while the argument, viewed as a jury argument, skillfully and effectively, from defendant's standpoint, points to and attacks the claimed factual weakness in the government's evidence as to the opening net worth as of January 1, 1947, it fails to demonstrate, as it claims to do, that the evidence made mandatory the direction of a verdict on the first count. When the appellant was here before, this court, on full consideration, determined adversely his contention that a verdict of acquittal should have been directed because (a) the proof was insufficient to establish an accurate opening net worth as of January 1, 1947, and (b) there was no showing of willfullness.

The evidence adduced by the government in support of its opening net worth on this trial was substantially the same as that it introduced on this point on the first trial, and the testimony of the defendant on this trial did not, as matter of law, effect any change.

As to the claim that the government failed to establish, as a matter of law, a reasonably accurate closing net worth, no such claim was apparently made on the first appeal, and the argument now made presents nothing more than an argument on the facts which the jury has rejected.

Apparently the defendant is of the opinion that the cases hold that in this kind of case the government's proof must attain the accuracy of a scientific demonstration, and that any failure to attain to this standard or any discrepancies in the proof will be fatal to the government's case.

We have been pointed to, we have found, no decision so holding.

Here, as in his argument in respect to the opening net worth statement, appellant makes nothing more than a jury argument against the sufficiency of the proof. He does not, he cannot, show that if the government's evidence is believed, a case for the jury is not made out. In short, appellant, drawing on the cautionary admonition in the cases as to the duty of the courts to see that a defendant is not convicted on insufficient evidence, that when his extra judicial statements are relied on, they must be corroborated, and, confusing what the court said in the Calderon case with respect to the proof showing an increase in net worth "over the prosecution years", the appellant is seeking to make contentions and arguments, which are all right in their place as arguments to the trier of facts, serve as arguments

in support of a claim that, as matter of law, there are no facts to argue to a trier.

We find no merit in appellant's contentions and no support for his arguments in the trilogy of cases, *Holland v. United States*, 348 U.S. 121; *Smith v. United States*, 348 U.S. 147; and *U. S. v. Calderon*, 348 U.S. 161, he cites.

It is true that in each of these cases the court did point out the perils to the defendant inherent in the net worth method of proof and did enjoin upon the courts special precautions to see to it that the defendant was not thrown into the position by this kind of prosecution of having to prove himself innocent of the charges, and it did discuss and determine the law as to corroboration of extra judical admissions such as made here with regard to opening and closing net worth. The result, however, of these discussions and determinations was to make it clear that, while corroboration was usually necessary, "admissions given under special circumstances, providing grounds for strong inferences of reliability, may not have to be corroborated", and that "It is sufficient if the corroboration merely fortifies the truth of the conviction without independently establishing the crime charged". In Calderon's case where, unlike here, the defendant was convicted for evasion on each of the four counts charged, the court pointed out that corroborating evidence could be sought in the proof of both parties where the defendant introduced evidence in his own behalf after his motion for acquittal has been overruled, and that, "while the *evidence as a whole* must show a deficiency for each

of the prosecution years, *the corroborating evidence* suffices if it shows a substantial deficiency for the over all prosecution period." (Emphasis supplied)

Instead then of holding in effect, as the appellant claims it does, that if the government approaches a net worth case on "a prosecution year theory", if its proof fails in any respect, it must be held to have failed to make out a case for any of "the prosecution years", the court really held that while in order to recover in any year the government must show a deficiency for that year, "the corroborating evidence suffices if it shows a substantial deficiency for the over all prosecution period."

No reversible error appearing, the judgment is AFFIRMED.

Exhibit B

JUDGMENT

Extract from the Minutes of April 26, 1957

No. 16234

JOE R. STEELE,

versus

UNITED STATES OF AMERICA

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

## Appendix C

## ORDER DENYING REHEARING.

Extract from the Minutes of June 11, 1957:

No. 16234

JOE R. STEELE,

versus

UNITED STATES OF AMERICA

It is ordered by the Court that the petition for rehearing filed in this Cause be, and the same is hereby, denied.

Appendix D

ORDER STAYING MANDATE FILED:-

June 13, 1957

UNITED STATES COURT OF APPEALS

For the Fifth Circuit

No. 16234

JOE R. STEELE, *Appellant,*

versus

UNITED STATES OF AMERICA, *Appellee.*

ON CONSIDERATION OF THE APPLICATION of the Appellant in the above numbered and entitled cause for a stay of the mandate of this Court therein, to enable him to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERED that the issue of the mandate of this court in said cause be and the same is stayed for a period of thirty days from June 11, 1957; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from June 11, 1957 there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the clerk shall issue the

mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from June 11, 1957, unless the above mentioned certificate shall be filed with the clerk of this court within that time."

DONE AT NEW ORLEANS, LA., this 13th day of June, 1957.

/s/ J. C. HUTCHESON, JR.
United States Circuit Judge

Office - Supreme Court, U.S.
FILED
SEP 7 1957
JOHN T. PEY, Clerk

No. 257

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1956

JOE R. STEELE
*Petitioner*

versus

UNITED STATES OF AMERICA
*Respondent*

## PETITIONER'S BRIEF IN REPLY TO BRIEF OF UNITED STATES IN OPPOSITION

JOE R. STEELE, *Petitioner*
BY: BEN F. FOSTER
and
RALPH G. LANGLEY
*Counsel for Petitioner*
Office and Post Office Address
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No. 257

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1956

JOE R. STEELE
*Petitioner*

versus

UNITED STATES OF AMERICA
*Respondent*

## PETITIONER'S BRIEF IN REPLY TO BRIEF OF UNITED STATES IN OPPOSITION

This reply brief will be directed topically, and in short form, to matters raised by the Government in its Brief in Opposition.

### I. LACK OF PROPER PREDICATE

The Government argues that the trial court is permitted to draw upon his recollection of the evidence at the first trial to infer the existence of a conflict not made a matter of record at the second trial. A predicate for impeachment cannot be laid by presumption; it cannot be laid by inference; it must be laid by evidence *in the record*. The prior inconsistent statement and the circumstances under which it was given must be called to the attention of the witness in such a way as to give him a full opportunity for explanation or exculpation. *The Charles Morgan v. Kouns*, 115 U. S. 69. This requirement was complied with in *Raffel v. United States*, 271 U. S. 494 (Footnote at Page 495).

Thus Steele was entitled to have called to his attention any alleged inconsistency between his testimony at the second trial and his silence at the first trial. This was the predicate which was necessary.

The predicate serves a secondary purpose. It demonstrates to the jury that the showing of *alleged inconsistency* is the only purpose of the evidence. But the complete absence of a predicate here left the jury free to conclude that the petitioner had committed some wrong by failing to testify at the first trial. This made the possibility "far from negligible" that the jury made "impermissible use of the testimony." *Grunewald v. United States*, at page 954, 1 L. Ed. 2d.

The opinion of this Court in *Grunewald v. United States*, 353 U. S. , 1 L. Ed. 2d 931, 951; sustains the contention here asserted in the following language:

> "Thus, although later, in the charge to the jury, the matter was specifically restricted to the issue of credibility, *there was no inquiry by the judge at the time of the initial admission of this evidence* as to whether a sufficient showing of inconsistency had been made." (Footnote 30) (Emphasis added)

Even assuming that a predicate, properly laid, would make the evidence admissible, no proper predicate was laid here and the admission of the evidence was error.

## II. NECESSITY FOR RAISING CONSTITUTIONAL QUESTIONS IN TRIAL COURT

Summarized, the Government's contentions here are that (1) petitioner by his failure to testify in

his own behalf at the first trial did not claim his Constitutional privilege against self-incrimination under the Fifth Amendment, and (2) that objections of petitioner's counsel at the time the question was asked at the second trial did not sufficiently apprise the trial court that a Constitutional question was raised.

### A. Failure to Take Stand Is Claim of Constitutional Privilege Per Se

At a trial of a criminal case how else can a defendant claim his privilege against self-incrimination than by refraining from taking the stand? Although no case has been found wherein the novel concept raised by the Government here has been passed upon, this Court has assumed that the act of not taking the stand *is* the claim of the privilege in the following language:

> "The defendants . . . stood on their constitutional right not to take the witness stand before the jury." *McNabb v. United States*, 318 U. S. 332, Footnote 5, Page 338.

Cases cited by the Government in support of this contention relate to hearings before Congressional committees and administrative tribunals and not to court proceedings and hence are not in point.

### B. Sufficiency of Objections to Raise Question of Abuse of Privilege Against Self-Incrimination

The Government contentions on this matter are refuted by the following considerations:

1. The simple act of asking the question in the presence of the jury was reversible error per se. Regardless of a ruling of the Trial Judge sustaining objections (if such had been the case), the damage had been done. No instruction could have corrected it.

2. The Trial Judge knew precisely what the question was. In passing upon the objections, the court said his action in overruling them was "based on a Supreme Court decision" (R. 1076). The function of an objection is to make certain that the court understands why the evidence is considered inadmissible. It is crystal clear that he was familiar with *Raffel v. United States*, 271 U. S. 494, (the only "Supreme Court decision" which could have been relied on as sustaining the Government's position) that he considered it controlling and that he felt its requirements had been met.

3. The privilege, once asserted, as it had been by failure to testify at the first trial, was subject to protection by the court. The evidence admitted on the second trial, reflecting as it did upon the man who asserted the claim, was a misuse of the privilege itself. "But the responsibility for misuse of the grant of the claim of privilege is the court's." *Johnson v. United States*, 318 U.S. 189, 199. Reassertion of the privilege was not necessary. It had already been claimed. The Trial Judge knew it. Petitioner had a right to protection from the trial court in not permitting the claim of privilege to be used against him.

4. The objection itself was sufficient. All that was necessary was that the court understand that the

privilege had been claimed on the first trial (which is patent from the record here) and that the admission of such evidence would be harmful and prejudicial to petitioner. Such was done in the following language:

> ". . . can serve no other purpose than to inflame and prejudice the minds of the jury against the Defendant and lead to a conviction on this trial."

### C. Sufficiency of Objections to Raise Due Process and Fair Trial Questions

The Government asserts "Although petitioner objected to the question he did not object on the ground that it would affect any constitutional right of his." (Government Br. P. 5). Petitioner says that violation of due process and denial of a fair trial do not necessitate objection. But, if they do, the objection here was full and complete. It called attention of the Trial Judge to the fact that the question (a) violated the "ground rule instruction" and (b) was irrelevant and immaterial to any issue in the case, and (c) that the admission of the evidence would inflame and prejudice the minds of the jurors against the defendant. These grounds were amply sufficient to call to the attention of the Trial Judge that the petitioner would be denied due process, *Watkins v. United States*, ____ U.S. ____, 1 L. Ed. 1273, 1299, and likewise be denied a fair trial.

## CONCLUSION

Finally the Government contends that because petitioner was a gambler and the jury knew it, and

also because the question was only a "single question" in a record of "well over a thousand pages of testimony" the entire matter is "wholly insignificant." (Government Br. P. 13)

A gambler, no less than any other citizen, is entitled to a fair trial. He is entitled not to have the rules changed in the middle of the game. The Trial Judge said he made his ground rule on the assumption that the defendant would not take the stand. Certainly such must have been his assumption because he stated such to be a fact, but there is not one iota of evidence in the record that such a representation was ever made to him or that his ruling and instruction was predicated on that condition. When petitioner took the stand the court was notified, out of the hearing of the jury, of his intention to do so, and yet no warning was given of the change in the "ground rule." Certainly the court can change any such rule, but a defendant is entitled to timely, full and fair notice of such change. No such notice was forthcoming here.

The contention that this was but a single question in a long record is comparable to the old contention that the man who was killed with an ice pick had only a small, insignificant hole in his body. Petitioner was harmed just as badly by the evidence as if it had been repeated a thousand times. This Court took notice of the harmful effect of such evidence in *Grunewald v. United States* in the following language:

> "... the weight to be given this evidence was less than negligible, since, as we have outlined above, there was no true incon-

> sistency involved; it could therefore hardly have affected the Government's case seriously to exclude the matter completely. On the other hand, the danger that the jury made impermissible use of the testimony by implicitly equating the plea of the Fifth Amendment with guilt is, in light of contemporary history, far from negligible."

Petitioner can only ask, if the evidence was so insignificant why was it thought necessary to ask the question and to urge its admissibility in the face of vigorous objection?

JOE R. STEELE, *Petitioner*

BY: BEN F. FOSTER
and
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506 South Texas Building
San Antonio, Texas

*Counsel for Respondent:*

SOLICITOR GENERAL
Department of Justice
Washington 25, D. C.

MR. RUSSELL B. WINE
United States Attorney
Federal Building
San Antonio, Texas

I hereby certify that I have delivered a copy of the above Petitioner's Brief in Reply to Brief of United States in Opposition to counsel named above by depositing in the United States Mail, with first class postage prepaid, to the Post Office address indicated in each instance:

BEN F. FOSTER

Office - Supreme Court, U. S.
FILED
AUG 5 1957
JOHN T. FEY, Clerk

No. 257

# In the Supreme Court of the United States

OCTOBER TERM, 1957

JOE R. STEELE, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
*Solicitor General,*
CHARLES K. RICE,
*Assistant Attorney General,*
RICHARD B. BUHRMAN,
*Attorney,*
*Department of Justice, Washington 25, D. C.*

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# In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 257

JOE R. STEELE, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The opinion of the Court of Appeals (Pet. 27–36) is reported at 243 F. 2d 712.

### JURISDICTION

The judgment of the Court of Appeals was entered on April 26, 1957 (Pet. 37) and a petition for rehearing was denied on June 11, 1957 (Pet. 38). The petition for a writ of certiorari was filed on July 10, 1957. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

### QUESTIONS PRESENTED

1. Whether the trial court committed reversible error in permitting the Government to elicit from peti-

tioner on cross-examination the fact that he had not testified at the first trial—petitioner having voluntarily taken the stand and having failed to assert any constitutional privilege.

2. Whether the trial court erred in admitting, on the issue of petitioner's credibility, evidence that he had been convicted in a state court of the felony of conducting a policy game.

## STATUTE INVOLVED

18 U. S. C. 3481 provides:

> In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts-martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him.

## STATEMENT

On May 5, 1954, petitioner was indicted in the United States District Court for the Western District of Texas for the wilful attempted evasion of his income taxes for the years 1947 and 1948 by filing false and fraudulent returns. A trial in 1954 resulted in a verdict of guilty on both counts, but the judgment was reversed by the Court of Appeals for errors in the admission of evidence. *Steele* v. *United States*, 222 F. 2d 628. Upon the second trial, the jury found petitioner guilty as to the year 1947 and not guilty as to 1948. (R. 1423.) On July 16, 1956, petitioner was sentenced to two years imprisonment and fined $7,500. (R. 1424.)

Petitioner was a professional gambler, and during the indictment years had partnership interests in policy games, dice games, football cards, and the distribution of punch boards and pinball machines. (R. 136, 142–143, 205, 310, 319, 452–453, 670, 691–692, 843.) In addition to his interests in these partnerships, petitioner engaged in considerable personal gambling, including dice playing, football and baseball bets and horse-racing bets, playing at times for large stakes. (R. 291, 436, 633.) Although he told the investigating agents that he played the odds and always came out on top, none of petitioner's income from personal gambling was reported on his returns, and he admitted that he had kept no record of it. (R. 521, 633; Govt. Exs. 6 and 8.) It further appeared that only meager records had been kept of the income of the gaming ventures in which petitioner was a partner. (R. 516–519, 583, 596, 673, 757–758, 1030–1032.)

The Government's reconstruction of petitioner's income for the years in question, based on the net worth expenditures method, showed that his true income exceeded his reported income by some $14,000 in 1947 and some $33,000 in 1948.

The amount of money which petitioner had borrowed from a relative, one J. T. Deaver, during 1948 (and the corresponding liability at the end of the year) became, at the second trial, one of the critical issues on the question of evasion of his 1948 taxes. At the first trial the Government introduced petitioner's sworn statement: "In addition, however, in the early 1940s I borrowed $2,500 from J. T. Deaver, in 1948 I

borrowed $4,500 from him. . . ." (Gov't Ex. 60).[1] Deaver was then alive. The statements were uncontradicted, and Deaver was not called as a witness. At the time of the second trial Deaver had died. Petitioner took the stand and testified that during the year 1948 he had borrowed not $4,500 from Deaver but $25,500. (R. 1066.) If true, this would have reduced his net worth, and correspondingly his 1948 net income, by $21,000. On cross-examination, petitioner testified that he had not taken the witness stand at the first trial of the case. He also admitted that he had been convicted of the felony of gambling in 1943.

## ARGUMENT

Petitioner here, as in the Court of Appeals, seeks to raise the issue of infringement of his constitutional privilege against self-incrimination. No such claim was made in the District Court, it is without merit, and there was no possible prejudice.

1. At the outset of the trial, and at the request of petitioner's counsel, the court asked both sides to try to avoid reference to the fact that the case had been tried before (R. 1075–1076). At that time it was understood by the court (R. 1076) that the petitioner was not going to take the stand. When petitioner did take the stand and introduced the surprising testimony that Deaver had lent him $25,500 during 1948 (R. 1066) (instead of $4,500, as he had previously said in a sworn statement), the Government, over ob-

[1] A certified copy of the record of the first trial, *Steele* v. *United States*, 222 F. 2d 628 (C. A. 5) has been lodged with the Clerk. Exhibit 60 (then numbered 57) was introduced at R. 482–483 of the first trial.

jection, was allowed to bring out the fact that petitioner had not testified at the previous trial. (R. 1076.)

Although petitioner objected to the question, he did not object on the ground that it would affect any constitutional right of his. Specifically, petitioner did not raise the question of the Fifth Amendment, the privilege against self-incrimination, or the statutory right that no presumption shall be taken from a defendant's failure to take the stand. The full text of the objections raised by petitioner's counsel as they appear in the transcript of record (R. 1075–1076) is given in the footnote.[3] It will be seen that the only

[3] "Mr. Foster. We object to counsel for the Government making any inquiry of the defendant or any other person concerning the previous trial of this case, for the reason that the fact that the case has been previously tried is immaterial and irrelevant to any issue in this case, and it cannot help but serve to prejudice the jury's mind against the defendant and cause them to speculate as to whether he was convicted or not, and if he was convicted why he is here being tried again. We believe that it would cause the jury to speculate and determine that he probably was convicted and that his case was reversed and was remanded here for another trial, and, as previously stated, that fact would be immaterial and irrelevant to any issue in this case and wholly prejudicial to the defendant.

"Mr. Langley. And, further, the fact that the jury might so assume and in all probability would so assume that since the jury in a previous case had convicted him, that there must have been some good and sound basis for such conviction, and such evidence will hence militate against the defendant and can serve no other purpose than to inflame and prejudice the minds of the jury against the defendant and lead to a conviction on this trial.

"Mr. Foster. And I, at least, understood at an early conference that Your Honor had instructed everyone that had any participation in this case to make no reference to any previous trial." [R. 1075–1076.]

ground raised was fear that the fact of a former trial would prejudice the jury. No mention was made of the Fifth Amendment or any other constitutional provision. No suggestion was made that to allow the question would undercut petitioner's privilege against self-incrimination. The District Court was never given the opportunity to rule on that issue.

Even two and a half months later, when petitioner filed his "Bill of Exception No. 2," and restated his objections to the question, no constitutional issue was raised. It was there suggested that such a question was immaterial and irrelevant and would "prejudice the minds of the jurors against the defendant and raise a question in the minds of the jurors as to the veracity of defendant's testimony." (R. 1485.) The nearest petitioner came to asserting his privilege against self incrimination was the statement in the Bill of Exceptions that the question—

> * * * would probably lead to speculation on the part of the jury as to the reason or reasons why the defendant did not take the stand in his behalf at a former trial, and that it probably would, in the minds of laymen, lead to the conclusion that if the defendant had been innocent, he would have taken the stand in his own defense at a former trial; that under the facts and circumstances of this case, the cumulative effect of any such interrogation would result in the denial of a fair trial to the defendant.

It is well settled that the privilege against self-incrimination must be specifically raised. While no precise formula of words is required, the fact that a man being interrogated is relying on his constitutional right

not to give testimony that may be used against him must be asserted. The claim must be sufficiently definite to apprise the court of his intention to rely on the privilege against self-incrimination. *See Quinn* v. *United States*, 349 U. S. 155; *Emspak* v. *United States*, 349 U. S. 190. "The privilege may not be relied on and must be deemed waived if not in some manner fairly brought to the attention of the tribunal which must pass upon it." *United States ex rel. Vajtauer* v. *Commissioner of Immigration*, 273 U. S. 103, 113. Even in *Johnson* v. *United States*, 318 U. S. 189, relied on by petitioner, the Court affirmed the conviction where it found that the defendant had not insisted upon his constitutional objections.

Not only was there no claim of privilege in the District Court by petitioner, there was no indication or allegation there that his original failure to take the stand was in any way connected with his constitutional privilege. It may well be, and would seem probable, that petitioner's failure to take the stand at the first trial was because Deaver was still alive, and petitioner feared that he would contradict petitioner's story as to the amount he had borrowed from Deaver in 1948.

We submit that, in these circumstances, the Court should decline to consider the constitutional issues which petitioner seeks to raise here, none of which were raised in the District Court.

2. In any event, petitioner's privilege against self incrimination was not violated by his being asked if he had testified at a former trial.

In *Raffel* v. *United States*, 271 U. S. 494, this Court held unanimously that it is not error to require a de-

fendant offering himself as a witness upon a second trial and denying the truth of evidence offered by the prosecution to disclose upon cross-examination that he had not testified as a witness in his own behalf upon the first trial, and to explain why he did not deny the same evidence when then offered. In the instant case, the trial court limited the Government to a mere inquiry as to whether petitioner had testified at the first trial. (R. 1076.) This limitation so diminished the value of the point to the Government that no reference to the first trial was made by either prosecutor in his summation.* Moreover, the court charged the jury, in connection with the fact that the case had been tried before, that "you will not consider for any purpose, nor discuss that fact in determining the guilt or innocence of the defendant". (R. 1415.) This case, then, is *a fortiori* from *Raffel*.

The petitioner argues, however, that the *Raffel* case is not controlling because (a) there was no showing here of inconsistency between petitioner's testimony and the evidence introduced by the Government at the first trial; (b) the court had asked counsel on both sides, before the trial, to avoid any reference to the fact that the case had been tried before; and (c) the vitality of the *Raffel* case has been destroyed or at least weakened by *Johnson* v. *United States*, 318 U. S. 189 and *Grunewald* v. *United States*, 353 U. S. 391.

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*The only approach to such a reference was the sentence: "I've already mentioned about his appearance on the stand here, the first time he's ever come forward in this case to offer these explanations." (R. 1388.) This could as well have referred to the many conferences petitioner had with the agents during the lengthy investigation as to his election not to testify at the first trial.

(a) Petitioner errs in stating (Pet. 14):

> There is no showing here, as there was in *Roffel*, that any statement of the defendant as a witness conflicts with any Government evidence adduced *at the former trial*. The record here simply does not show the slightest basis for the asking of the question. [Emphasis in original.]

The Government's evidence relating to petitioner's assets and liabilities was, so far as pertinent here, substantially the same at both trials.[4] And since the same judge presided at both trials he may be presumed to have been aware of that fact. Near the end of the second trial, petitioner took the witness stand and testified to aspects of his financial affairs in sharp conflict with written and oral statements he had made to the investigating agents and, accordingly, in conflict with the Government's evidence at both trials. This testimony, if believed, would have had the effect of wiping out the unreported income for 1948 and cutting down that for 1947. One example will suffice. Petitioner had stated under oath, in writing that he owed Deaver $7,000 as of the end of 1948. (R. 528, 702; Govt. Ex. 60.) He had specifically requested the Government agents not to get in touch with Deaver because he was old and sick. (R. 515.) Nothing to contradict the $7,000 figure was ever suggested to the Government during the long investigation (which began in 1951—R. 581) or during the first trial. At the second trial (in 1956), petitioner testified that at the

[4] Compare R. 635–709 with the record of the first trial (No. 15,187, R. 638–654, 663–669), *Steele* v. *United States*, 222 F. 2d 628 (C. A. 5).

end of 1948 he had owed Deaver $28,000. This item alone, representing a $21,000 increase in a liability at the closing point, would have destroyed about two-thirds of the unreported income for 1948. Since petitioner's testimony was in direct conflict with evidence adduced by the Government at both trials, it became appropriate to inquire as to whether petitioner had testified at the first trial, which was done here, and (under *Raffel* v. *United States*, *supra*) to call upon him to explain why he had not so testified, which was not done here.

(b) Also without merit is the argument (Pet. 15–20) that the alleged error was aggravated by the fact that before the trial the court had instructed counsel on both sides to avoid reference to the fact that the case had been tried before. This "ground rule" (Pet. 15) was promulgated at petitioner's request. The court had acceded to the request on the assumption that, as in the former trial, petitioner would not testify. (R. 1075–1076.) The jury knew, long before petitioner took the stand, that the case had been tried previously because references to that trial had been made by two witnesses called by the Government (both of whom were friends of petitioner) and petitioner had moved for a mistrial. (R. 309–310, 325, 363–369, 1470–1471.) The basis for petitioner's main objection to the question of whether he had testified at the first trial (*i. e.*, that it might cause the jury to speculate that he had been convicted) was therefore swept away. (R. 1074–1075.) And certainly the District Court is the one to interpret its own "ground rule."

(c) In *Johnson* v. *United States*, 318 U. S. 189, the defendant, testifying in his own behalf, asserted a claim of privilege against self-incrimination while on the witness stand. The trial judge granted this claim but permitted the prosecutor in his summation to capitalize upon the fact that the defendant had found it necessary to invoke it. This Court affirmed the conviction. It went on to say that the trial court had erred in allowing defendant's claim of privilege because the question at issue was relevant and "was a proper part of cross-examination" (318 U. S. at 196), but, having allowed it, should not have permitted the prosecution to comment upon, and the jury to draw inference from, the claim of privilege. "In short," "an accused should not be misled on that score * * * if it is claimed and granted outright, he has every right to expect that the ruling is made in good faith and that the rule against comment will be observed." (318 U. S. at 197.) As this recital shows, there is but little similarity between *Johnson* and the instant case.

The critical question in *Grunewald* v. *United States*, 353 U. S. 391 was whether the defendant Halperin's invocation of the privilege against self-incrimination before the grand jury was so inconsistent with his willingness to answer the same questions at the trial as to permit its use against him for impeachment purposes. The Court held that on the facts of that case there was no such inconsistency; that Halperin, already a potential defendant when he appeared before the grand jury, might well have furnished bits of evidence tending to incriminate himself

even though wholly innocent; that the fundamental differences between a trial and a grand jury proceeding must be taken into account; and that "the danger that the jury made impermissible use of the testimony by implicitly equating the plea of the Fifth Amendment with guilt is, in light of contemporary history, far from negligible". (353 U. S. at 421.) The Court explicitly noted that it was not reexamining or overruling the *Raffel* case (353 U. S. at 421).

None of the considerations which impelled the decision in *Grunewald* is present in the case at bar. Here, there was plain inconsistency between petitioner's contradicting of his own sworn statement at the second trial and his allowing it to stand unchallenged at the first. The forum was the same and petitioner on both occasions had all the protections accorded a defendant at a trial, as distinguished from grand jury proceedings. As noted above, there was no reference in the presence of the jury to the Fifth Amendment or the privilege against self-incrimination. See *supra*, pp. 5–6. There would appear to be a valid distinction between the case where one asserts his constitutional privilege against self-incrimination and where one simply stays silent. One always has a right to remain silent where a truthful statement would tend to incriminate, but "Silence is often evidence of the most persuasive character." *Bilokumsky* v. *Tod*, 263 U. S. 149, 153–154.

3. There was no prejudice to petitioner. The alleged error on which petitioner seeks to have his conviction upset must be judged in its context. The incident now complained of was so minor in the

setting of the whole trial, particularly in view of the court's drastic limitation on the line of inquiry (R. 1076), the instruction to the jury (R. 1415), and the utter failure of the prosecution to capitalize on the matter,[5] that it seems highly unlikely that it could have had any impact on the verdict. *Cf.* the concurring opinion of Mr. Justice Frankfurter in *Johnson* v. *United States*, 318 U. S. at 202.

The trial lasted for two full weeks. There were fifty witnesses and well over a thousand pages of testimony. The single question as to which petitioner now complains was wholly insignificant. As pointed out above, there had been prior testimony as to the existence of the previous trial. Petitioner's counsel himself brought out the fact that petitioner had been convicted at that trial (R. 1227). The most critical issue as to which the cross-examination was directed related to the 1948 income tax. As to this count, petitioner was acquitted.

One week before the trial was over, the court indicated to counsel how he intended to charge the jury as to the former trial:

> The COURT. Let the record show that the Court intends to charge the jury that they must not consider for any purpose any reference to a former trial of this case, but are to consider solely and only the evidence adduced on this trial, unless the defendant requests that such instruction not be given. (R. 1425.)

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[5] In the summations of Government counsel no reference was made to the previous trial. In the summations of defense counsel three such references were made. (R. 1344, 1352, 1353.)

Petitioner took no exception to the proposed charge. None of petitioner's numerous requested instructions (R. 1432–1450) dealt with the issue of the former trial.[a] Neither did any of his objections to the charge that was given (R. 1451–1454). The charge, running some 27 pages, instructed the jury not to discuss or consider for any purpose the fact that there had been a former trial:

> The evidence in this case has developed the fact that the case has been tried before. In that connection, you are instructed that you will not consider for any purpose, nor discuss that fact in determining the guilt or innocence of the defendant. [R. 1415.]

There was the barest inquiry as to whether petitioner had taken the stand at the first trial, after which the court stopped further questioning. Petitioner was not asked whether he had pleaded the Fifth Amendment, or whether he had thought that the truthful answer to a particular question would tend to incriminate him. There was no attempt to equate the exercise of petitioner's constitutional rights with proof of guilt. The thrust of the inquiry on cross-examination was rather: "Did you ever tell this story before?"—a question which might well have been asked, and to which petitioner could hardly have objected. Nor did the prosecution make an attempt to arouse the jury or to prejudice petitioner by his failure to take the stand in the first trial. No further questions

[a] The cross examination as to the former trial was ground number 21 of petitioner's 32 grounds raised in his motion for new trial. (R. 1474.)

were asked by the prosecution as to the first trial. It was not referred to in summation.

4. Petitioner argues (Pet. 20–24) that the trial court erred in admitting evidence, on his cross-examination, that he had been convicted of the felony of operating a policy game (R. 1073). Petitioner concedes (Pet. 20) that it is well settled that when a defendant takes the witness stand evidence of a prior felony conviction is admissible on the issue of his credibility, but contends that (a) here the offense was too remote in time to have probative value, and (b) the rule permitting such evidence should be re-examined.

(a) The prior felony conviction was had in 1943, the tax years involved in this prosecution were 1947 and 1948, and the trial was held in 1956. Plainly, the offense was not so remote as to render the trial court's ruling an abuse of discretion. *Siglar* v. *United States*, 208 F. 2d 865, 868 (C. A. 5), certiorari denied, 347 U. S. 991; *United States* v. *Bucur*, 194 F. 2d 297, 304 (C. A. 7).

(b) Petitioner urges that, as a practical matter, juries are unable to obey an instruction (R. 1412) that such evidence must not be considered on the issue of guilt or innocence but only on that of the defendant's credibility. None of the cases he cites (Pet. 22) for this proposition, however, is in point.[7] We need

[7] The language quoted from *Krulewitch* v. *United States*, 336 U. S. 440, 453, appeared in a discussion of the difficulties encountered by defendants charged with conspiracy. *Nash* v. *United States*, 54 F. 2d 1006, 1007 (C. A. 2) and *United States* v. *Gottfried*, 165 F. 2d 360, 367 (C. A. 2), involved admissions of co-defendants. *United States* v. *Antonelli Fireworks Co.*, 155 F. 2d 631, 656 (C. A. 2), related to an impropriety by Government counsel.

not argue whether it is desirable to re-examine the rule admitting such evidence, for it seems very clear that the instant case is peculiarly unsuitable for any such review. The evidence, including petitioner's own income tax returns, clearly showed that he had been a professional gambler and policy game operator since at least 1945. (*Supra*, p. 3, Govt. Exs. 2, 4, 6, 8, 18 and 19.) On *voir dire* examination of the jury panel, defense counsel stated that petitioner had been a gambler, emphasized that gambling was no violation of *federal* law, and inquired as to whether any of the prospective jurors might have a prejudice against him for that reason. (R. 13.) Since the jury was well aware of the fact that petitioner had been flagrantly violating the state gambling laws for years, it could hardly have come as a surprise to them that he had suffered one conviction. Plainly, the Court of Appeals was correct in stating (Pet. 32) "the proof of the conviction for gaming could not be said to have in any way introduced a new element into the case which reflected discreditably upon appellant."

## CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

J. LEE RANKIN,
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AUGUST 1957.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1957

No. 257

JOE R. STEELE,
*Petitioner*

versus

UNITED STATES OF AMERICA
*Respondent*

## MOTION FOR REHEARING ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOE R. STEELE, *Petitioner*

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## MOTION FOR REHEARING ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner respectfully moves for a rehearing of the order of this Court dated October 14, 1957, denying certiorari and says:

I.

Denial of certiorari is in direct conflict with *Grunewald v. United States*, 353 U. S. 391, and *Raffel v. United States*, 271 U. S. 494 wherein this

Court held that a predicate must be laid as a condition precedent to the admission of evidence of defendant's failure to take the stand at a former trial. *The record here is absolutely devoid of any predicate whatsoever.*

II.

Denial of certiorari is in direct conflict with *Grunewald v. United States*, 353 U. S. 391, wherein this Court held that a judicial determination *by the trial judge* of the sufficiency of the predicate is a mandatory prerequisite to the admissibility of evidence as to a defendant's failure to testify in his own behalf at a former trial. *No such determination was even considered here.*

III.

In *Grunewald v. United States*, 353 U. S. 391, four members of this Court concluded that evidence identical to the evidence admitted in the case at Bar is inadmissible per se and violative of fundamental Constitutional rights under the Fifth Amendment.

IV.

Certiorari could be granted and a reversal and a remand of this cause ordered on memorandum opinion without oral argument by the mere citation of *Grunewald v. United States*, 353 U. S. 391; *Slochower v. United States*, 350 U. S. 551; and *Watkins v. United States*, 252 U. S. 822. All pertinent facts and law are before the Court.

WHEREFORE, Petitioner prays as in his application for Writ of Certiorari.

JOE R. STEELE, *Petitioner*

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I hereby certify that this Petition for Rehearing is presented in good faith and not for delay and that it is restricted to the grounds specified in Rule 58 of the Revised Rules of the Supreme Court of the United States. I further hereby certify that I have delivered a copy of the above Petitioner's Motion for Rehearing to counsel named above by depositing in the United States Mail, with first class postage prepaid, to the Post Office address indicated in each instance.

BEN F. FOSTER